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In the Supreme Court of the United States

OCTOBER TERM, 1976

UNITED STATES OF AMERICA, PETITIONER

v.

CHARLES W. RAMSEY and JAMES W. KELLY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-20a) is not yet reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, p. 21a) was entered on June 10, 1976. On July 1, 1976, the Chief Justice extended the time

within which to file a petition for a writ of certiorari to and including August 9, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether probable cause and a search warrant are required before customs officials may open an envelope entering the United States from abroad, when they suspect that the envelope contains smuggled goods.

CONSTITUTIONAL PROVISION, STATUTES AND REGULATIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

19 U.S.C. 482, 19 U.S.C. 1582, and the pertinent portions of 19 C.F.R. Part 145 and 39 C.F.R. Part 61 are set out in App. C, *infra*, pp. 22a-27a.

STATEMENT

From November 1973 until January 1974, Sylvia Bailey and William Ward were principals in an international narcotics trafficking ring (App. A, *infra*, pp. 2a-3a). West German agents investigating Bailey and Ward intercepted trans-Atlantic telephone conversations between Bailey and respondent Ramsey during which narcotics were discussed (*id.* at 3a).

In late January 1974 Bailey and Ward moved the base of their operation to Thailand. Thai officials, alerted by West Germany, saw them mailing numerous envelopes. Five envelopes were inspected by Thai officials; one of the addresses was later linked to respondents. On February 2, 1974, Thai officials arrested Bailey and Ward and seized numerous sealed envelopes containing heroin.[1] Eleven of the envelopes bore Washington, D.C. addresses connected to respondents (*ibid.*).

Two days later, George Kallnischkies, a customs inspector in New York City who was unaware of these events, detected undeclared matter in eight envelopes en route from Thailand to four addresses in Washington, D.C. (App. A, *infra*, pp. 3a-4a). These envelopes were "rather bulky," and Inspector Kallnischkies believed that they contained merchandise rather than letters (Tr. 3-7, 25, 32).[2] He weighed one of them and found that it was three times the ordinary weight of an airmail letter (Tr. 8-9, 27). He opened this envelope and found, between two

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[1] Bailey and Ward have never been available in the United States for trial. App. A, *infra*, p. 2a n. 1.

[2] "Tr." and "2 Tr." refer to volumes one and two of the transcript of the suppression hearing on October 25, 1974.

pieces of cardboard, a plastic bag containing a white substance that he believed to be heroin. Based upon this discovery, he opened the other seven bulky envelopes, which appeared to have been addressed on the same typewriter as was the first envelope (Tr. 25).

Inspector Kallnischkies resealed the envelopes. Six of them were delivered to three addresses. Federal agents saw respondent Kelly collect the envelopes, rendezvous with respondent Ramsey, and give Ramsey a brown paper bag (App. A, *infra*, p. 4a). Respondents were arrested. The bag contained the six envelopes, $1,100 in cash, and material with which to dilute the heroin (*ibid.*).

Respondents were indicted for numerous offenses arising out of this transaction. They moved to suppress the heroin that had been discovered by Inspector Kallnischkies.[3] After an evidentiary hearing, the district court denied the motion from the bench (2 Tr. 43). Respondents then waived their right to a jury trial. The case was submitted on the basis of stipulated facts and exhibits. On December 20, 1974, the district court found respondents guilty of unlawful importation of heroin and of possession of heroin with intent to distribute it, in violation of 21

[3] It is not clear why respondents have standing to object to Inspector Kallnischkies' opening of the envelopes. The envelopes were not addressed to them and contained no correspondence. The government did not contend below that respondents lack standing, however, and we therefore have not presented it as a question for resolution by this Court. See *United States* v. *Santana*, No. 75-19, decided June 24, 1976, slip op. 3 n. 2.

U.S.C. 841(a) and 952(a). The court also found respondent Kelly guilty on one count, and respondent Ramsey guilty on three counts, of the unlawful use of a communication facility, in violation of 21 U.S.C. 843(b). Finally, the court found respondent Ramsey guilty of two firearms offenses.[4] Respondent Ramsey was sentenced to concurrent terms of imprisonment, the longest of which was 10 to 30 years. Respondent Kelly was sentenced to partially concurrent and partially consecutive terms aggregating 10 to 30 years' imprisonment.

A divided panel of the court of appeals reversed. Although it found Inspector Kallnischkies' seizure of the envelopes reasonable, it held that the envelopes could not be opened without probable cause and a warrant. The court acknowledged that border searches have traditionally been recognized as an exception to the warrant requirement of the Fourth Amendment (App. A, *infra*, pp. 5a-7a). It thought, however, that this exception was justified only by the exigencies attendant upon most border searches (*id.* at 7a); finding no exigencies compelling Inspector Kallnischkies to act without a warrant, the court concluded that he could not do so.

[4] These offenses—receiving and possessing a firearm as a convicted felon, in violation of 18 U.S.C. App. 1202(a)(1), and receiving and possessing a pistol, in violation of 22 D.C. Code 3203—were the subject of a separate indictment. The weapons were found as a result of respondents' arrests and so are "fruit" of the discovery of the heroin. The convictions consequently must stand or fall with the heroin offenses.

The court distinguished between envelopes and larger containers, indicating that warrantless searches of the latter would be allowed with or without exigent circumstances. The court advanced four reasons for this distinction. First, only "limited kinds of contraband * * * can be concealed within a letter-sized envelope," so that it is less likely that an envelope, "rather than an automobile or a suitcase, contains contraband" (App. A, *infra*, p. 8a). Second, the court thought that officials using metal detectors, X-rays, and trained dogs could detect items smuggled in envelopes more readily than those concealed elsewhere (*ibid.*). Third, envelopes can be detained more readily than travellers while a warrant is being obtained (*id.* at 10a). Finally, the court thought that warrantless openings of envelopes would inhibit freedom of expression (*id.* at 11a-13a).

Judge Robb dissented. He would have followed the decisions of other courts of appeals that have allowed warrantless inspections of envelopes at the border (App. A, *infra*, pp. 19a-20a). In his view, the historical justification for border searches is sufficient to allow the opening of an envelope. He also questioned the consistency of the majority's position: observing that the majority would allow searches of people and packages, he argued that a package should not acquire greater security against inspection simply because it is smaller or is not carried by a person.

REASONS FOR GRANTING THE PETITION

Millions of envelopes enter the United States from overseas each year. Many of these envelopes are large, stiff or bulky, and they conceal their contents as well as does a cardboard box.[5] Unless customs officers have authority to inspect these envelopes, they will become hiding places for smuggled goods of all sorts. The court of appeals, by requiring probable cause and a warrant as a precondition to such an inspection, has created just such a possibility. We submit that its decision places unreasonable restraints upon customs searches. Moreover, this is a matter as to which uniform national rules are imperative, and there is thus a need for this Court to resolve the conflict among the circuits created by the decision below.

1. Inspector Kallnischkies inspects mail entering in New York City. His predicament illustrates the problems caused by the decision below. Under at least two cases decided by courts with jurisdiction over his place of employment, he may open envelopes without probable cause or a warrant. *United States* v. *Doe*, 472 F. 2d 982, 984-985 (C.A. 2) (dictum), certiorari denied *sub nom. Rodriquez* v. *United States*, 411 U.S. 969; *United States* v. *Swede*, 326 F. Supp. 533, 536 (S.D. N.Y.). Moreover, Inspector

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[5] The court of appeals' holding applies to all "international letter class mail" (App. A, *infra*, pp. 9a-10a and n.6), a category that includes packages weighing as much as 60 pounds for which the requisite amount of postage is paid. See 39 C.F.R. 22.1(b) and (c).

Kallnischkies once opened an envelope bound from Columbia to Woodhull, Illinois, and found that it contained cocaine. The court of appeals held that he acted properly. *United States* v. *Bolin*, 514 F. 2d 554 (C.A. 7).[6]

In this case he followed an identical procedure with envelopes bound from Thailand to the District of Columbia. The court of appeals held that his actions violated the Fourth Amendment because he lacked probable cause and a warrant. If the envelopes had been delivered in the Virginia or Maryland suburbs of the District, however, the search would have been upheld. *United States* v. *Milroy*, C.A. 4, No. 75-1675, decided March 2, 1976, certiorari denied, June 7, 1976 (No. 75-6479). Courts in many other destinations also would have upheld the Inspector's procedure. See *United States* v. *King*, 517 F. 2d 350, 352-353 (C.A. 5);[7] *United States* v. *Barclift*, 514 F. 2d 1073, 1074-1075 (C.A. 9), certiorari denied, 423 U.S. 842; *United States* v. *Beckley*, 335 F. 2d 86, 88-89 (C.A. 6) (dictum), certiorari denied *sub nom. Stone* v. *United States*, 380 U.S. 922.[8]

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[6] See also *United States* v. *Odland*, 502 F. 2d 148, 151 (C.A. 7), certiorari denied, 419 U.S. 1088.

[7] See also *United States* v. *Henritze*, 522 F. 2d 1279 (C.A. 5), certiorari denied, March 22, 1976 (No. 75-913).

[8] All of the cases cited except *Doe* and *Beckley* approve a warrantless opening of an envelope; *Doe* and *Beckley* approve the warrantless opening of packages, but both indicate that the opening of envelopes should be governed by the same standards.

The court of appeals acknowledged that it was creating a conflict among the circuits (App. A, *infra*, p. 6a). This conflict is undesirable. There is no reason why Inspector Kallnischkies should be required to vary his inspection procedures depending upon the destination of the envelope. Custom officials inspect incoming items at 136 ports of entry (39 C.F.R. 61.3), and each port may receive items bound for any destination in the United States. The procedures used by these inspectors, and by the Postal Service, should be uniform. A disparity of practices may substantially weaken the customs inspection system by permitting smugglers to send their goods freely to destinations where probable cause and a warrant are required, bypassing destinations where courts have approved present procedures.[9] The conflict among the circuits therefore requires resolution by this Court.

2. Congress has explicitly endowed the Customs Service with the power it exercised here. A statute first enacted by the same Congress that proposed the Bill of Rights (see *Boyd* v. *United States*, 116 U.S. 616, 623) provides that a customs officer may search "any trunk or envelope * * * in which he may have

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[9] The Postal Service has notified the Customs Service that it will not turn over for customs inspection mail bound for the District of Columbia unless the Bureau complies with the procedures required by the court below. The Customs Service informs us that compliance with the required procedures is impossible with current personnel (62 inspectors in 26 major customs offices) and would be impractical even with an expanded staff.

reasonable cause to suspect there is merchandise which was imported contrary to law" (19 U.S.C. 482). See also 19 U.S.C. 1582. Pertinent regulations provide that mail originating outside the United States is subject to customs inspection and that a warrant is required only if an inspector believes it necessary to read particular correspondence. See 19 C.F.R. Part 145 and 39 C.F.R. Part 61. (These statutes and regulations are set forth at App. C, *infra.*)

Although the judgment of Congress is entitled to a "strong presumption of constitutionality," especially when it turns upon what is "reasonable" (*United States* v. *Watson*, 423 U.S. 411, 416; *United States* v. *Di Re*, 332 U.S. 581, 585), the court of appeals dismissed the statutes as "of no consequence" (App. A, *infra*, p. 13a n. 7). We believe that the statutes are entitled to deference. If two statutes and an entire set of regulations are to be struck down as unconstitutional, this Court should make that judgment.

3. Article I, Section 8, clauses 1 and 3 of the Constitution grant Congress the power to regulate commerce with foreign nations and to lay and collect duties. *United States* v. *12 200-ft. Reels of Super 8mm. Film*, 413 U.S. 123, 125-126. Because the power thus granted includes the power to "exclude merchandise at [Congress'] discretion" (*Brolan* v. *United States*, 236 U.S. 216, 219; *Weber* v. *Freed*, 239 U.S. 325, 329), it also includes the power to condition the entry of all things into the country upon exposure to the routine, suspicionless inspec-

tions necessary to prevent the importation of prohibited things. *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 272. "Travellers may be * * * stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in." *Carroll* v. *United States*, 267 U.S. 132, 154.

The right to inspect is not diminished simply because a person and his goods enter this country by separate routes. Searches of containers at the border for smuggled goods "are totally different things" from inland searches. *Carroll, supra*, 267 U.S. at 149 (quoting from *Boyd* v. *United States, supra*, 116 U.S. at 623). This Court has made it clear many times that there is no need for a warrant or even suspicion for a border search. *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 878-884 (opinion of the Court), *id.* at 887 (Rehnquist, J., concurring); *Almeida-Sanchez* v. *United States, supra*, 413 U.S. at 273; *United States* v. *12 200-ft. Reels, supra*, 413 U.S. at 125; *United States* v. *Thirty-seven Photographs*, 402 U.S. 363, 376; *Carroll* v. *United States, supra*, 267 U.S. at 153-154; *Boyd* v. *United States, supra*, 116 U.S. at 623.

Such searches are justified by force of circumstance. Inspections at random, or on suspicion not amounting to probable cause, are necessary implements of the enforcement of the customs laws. Bulky envelopes and packages arriving from abroad rarely announce that they contain contraband, and customs officers rarely know enough about them to have even

a fair idea of their contents. To require probable cause as a condition of inspection would be, in most instances, to guarantee success to smugglers. And, because "no Warrants shall issue, but upon probable cause," no warrant could be obtained to authorize an ordinary border search.[10]

The searches are also justified by force of history.[11]

[10] Although the court of appeals held that an envelope cannot be inspected without probable cause, it also indicated that it would take a flexible view of probable cause (App. A, *infra*, pp. 13a-14a n. 8). It is difficult to know what to make of this. Is it enough that the inspectors have probable cause to believe that the envelope contains something other than a letter? If so, the requirement is practically meaningless, since only those kinds of envelopes are presently opened by Customs. But if something more is necessary, then the chances of successful smuggling are dramatically increased.

[11] As this discussion indicates, we disagree with the court of appeals' belief that only exigent circumstances justify warrantless inspections, and that border searches are permissible only insofar as they are required by exigencies. The border search rules stand on their own practical and historical footing, as do the rule allowing seizure of things found in plain view (*United States* v. *Harris*, 390 U.S. 234, 236) and the rule allowing warrantless arrests (*United States* v. *Watson*, *supra*). Neither turns upon exigent circumstances. Indeed, the court of appeals disregarded its own reasoning by indicating that it would uphold warrantless inspections of packages, even in the absence of exigent circumstances.

Moreover, this Court has recognized (*United States* v. *Robinson*, 414 U.S. 218) that searches falling within an exception to the Warrant Clause can be conducted whether or not they satisfy the rationale that originally justified the exception. If it were otherwise, officials would not have the certainty that is necessary in carrying out their duties. The court of appeals' approach, which requires essentially a case-by-case analysis to determine whether a particular border search "really" was necessary under the rationale for border searches as a class, would deprive officials of this necessary certainty.

Border searches of envelopes, trunks, and people were accepted practices at the time of the adoption of the Constitution and the propriety of the practice has remained virtually unquestioned to this day. Mr. Justice Holmes has reminded us that "a page of history is worth a volume of logic" (*New York Trust Co.* v. *Eisner*, 256 U.S. 345, 349). Here, in Mr. Justice Frankfurter's words, "there is not merely 'a page of history,' * * * but a whole volume" (*Galvan* v. *Press*, 347 U.S. 522, 531). That history may not fix the meaning of the Fourth Amendment, but it shapes its interpretation, and courts are not free to disregard its claims.[12]

4. The rationales for border searches apply with equal force to inspections of envelopes. As Judge Robb observed (App. A, *infra*, p. 19a), "that the contents to be inspected are enclosed in an envelope, rather than by wrapping paper and twine, cannot be of critical significance." The search of a person crossing the border involves an intrusion far greater than the brief inspection of an envelope; it would be ironic if the less intrusive search required both probable cause and a warrant, while the more intrusive search required neither.

[12] The court of appeals wrote that the argument from history has been "squarely rejected" by this Court (App. A, *infra*, p. 7a n. 5). It has not. See *United States* v. *Watson*, *supra* (relying upon history to approve felony arrests without a warrant).

The fact that many envelopes contain letters adds nothing to the analysis. Letters also may be enclosed in packages or carried on the person, yet the court of appeals would allow inspection of packages and people. Conversely, envelopes may and often do carry only merchandise. That was so here; the six envelopes delivered to respondents contained only cardboard and heroin.

The court of appeals' concern for personal correspondence is a legitimate one. The Customs Service regulations provide (19 C.F.R. 145.3) that no correspondence can be read without a warrant. But there has been no showing in this case that customs inspectors read or censor mail. The Postal Service refers an incoming envelope to the Customs Service for inspection only if the envelope appears to contain things other than, or in addition to, written matter. The Customs Service has informed us that between July 1975 and February 1976 its inspectors opened less than one percent of envelopes so referred. This regular administrative procedure is susceptible of judicial scrutiny after the fact; there is no need for a warrant to ensure that the administrative conduct is reasonable. Cf. *United States* v. *Martinez-Fuerte*, No. 74-1560, decided July 6, 1976.

We further note in this connection that the court of appeals has significantly mischaracterized the issue presented by this case. The court speaks of "the practice of routinely opening mail" (App. A, *infra*,

p. 11a) and, again, of "[r]outine opening of international mail" (id. at 13a), as though it is regular practice to open international letter-class mail. In fact, the statute authorizes warrantless openings of incoming envelopes only when there is "reasonable cause to suspect" that the envelope may contain merchandise being improperly imported, as there was in this case. There is no practice of "routine" opening without a warrant of envelopes that outwardly appear to contain only written matter. The important question that we ask this Court to decide in a manner reaffirming virtually unanimous prior judicial precedent concerns the right to open without a warrant, for purposes of customs inspection, incoming envelopes reasonably believed to contain merchandise of some sort.

In any event, respondents have not argued that *their* correspondence was read, nor could they, for the envelopes contained no correspondence. Whatever inhibitory effect customs inspections may have on others, respondents were not exposed to it. Nor is such an effect different in kind from that attending the inspection of all envelopes coming into a prison. "The possibility that contraband will be enclosed in letters" is sufficient to allow prison officials to open *all* envelopes. *Wolff* v. *McDonnell*, 418 U.S. 539, 577. The possibility that smuggled items will be enclosed in envelopes therefore should be sufficient to allow customs inspectors to open a carefully-selected group of envelopes that appear to contain things other than letters.

Finally, the search in the instant case was not of a wafer-thin aerogramme incapable of enclosing a foreign substance. The envelope here was bulky and stiff; it, no less than a cardboard box, could disguise its contents unless opened for inspection. To the extent that different standards should be applied to packages and envelopes, these envelopes, partaking of the concealing characteristics of packages, should be judged by the package standards.

The decision of the court of appeals would increase the complexity and diminish the effectiveness of the process of detecting smuggled goods at the border. The court was not entitled to substitute its judgment for that of Congress and the responsible executive officials unless the Fourth Amendment left it no alternative. We submit that the Fourth Amendment does not require either probable cause or a warrant for an inspection of envelopes at the border.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 1976.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1275
No. 75-1276

UNITED STATES OF AMERICA

v.

CHARLES W. RAMSEY, APPELLANT

No. 75-1691

UNITED STATES OF AMERICA

v.

JAMES W. KELLY, APPELLANT

Appeals from the United States District Court
for the District of Columbia
(Crim. 74-623)

Argued December 10, 1975

Decided June 10, 1976

Before: McGowan, Tamm and Robb, *Circuit Judges.*

Opinion for the court filed by *Circuit Judge* McGowan.

Dissenting opinion filed by *Circuit Judge* Robb.

McGowan, *Circuit Judge*: Appellant Ramsey was convicted in the District Court on one count of unlawful importation of heroin (21 U.S.C. § 952(a) (1970)); three counts of unlawful use of a communication facility (21 U.S.C. § 843(b) (1970)); one count of possession of heroin with intent to distribute (21 U.S.C. § 841(a) (1970)); one count of unlawful receipt and possession of a firearm (18 U.S.C. § 1202 (a)(1) (1970)) and one count of unlawful possession of a pistol (22 D.C. Code § 3203 (1973)). Appellant Kelly was convicted on one count of unlawful importation, one count of unlawful use of a communication facility, and one count of possession with intent to distribute. On appeal, a number of allegations of error are made, one of which we find to be of merit, and we therefore reverse the convictions.

I

The case was tried to the District Judge on the basis of a lengthy stipulated record which we need summarize only in broad outline. In November of 1973, Sylvia Bailey and William Ward,[1] who resided

[1] Bailey and Ward were indicted with appellants, but have never been available in the United States for trial.

in West Germany, were engaged in international narcotics trafficking. They were subjected to electronic surveillance pursuant to a West German court order, and the wiretap led to a search of Ward at the Munich Airport in December of 1973, which turned up no drugs but $10,000 in cash. The wiretap was reactivated in January of 1974, and among the calls intercepted were incriminating trans-Atlantic conversations concerning narcotics between Bailey and appellant Ramsey.

Ward and Bailey travelled to Thailand in late January of 1974, and Thai officials were alerted to their presence by West German agents. The Thai officials placed them under surveillance, and observed Ward mailing letter-sized envelopes in six different mail boxes. Five of these envelopes were recovered, and among the addresses they bore was a mail drop in Washington, D.C. later linked to appellants. On February 2, 1974, Bailey and Ward were arrested in their hotel room in Thailand, and seized in the raid were all the ingredients for the narcotics importation scheme. Among the items so obtained were numerous sealed, heroin-filled envelopes, eleven of which bore Washington, D.C. addresses with which appellants were later found to have a connection.

Two days later in New York—independently and without any knowledge of the foregoing—Customs Inspector George Kallnischkies seized and, proceeding without a warrant, opened eight envelopes found to contain heroin. The envelopes had been mailed from Thailand and were destined for four addresses in the

Washington area. These envelopes were resealed and forwarded to Washington, and six were delivered to three addresses. Federal agents witnessed Kelly retrieve all six envelopes, rendezvous with Ramsey at the latter's residence, and transfer to Ramsey a brown paper bag. The agents moved in and arrested both men. The paper bag was found to contain six letters, $1,100 in cash, and cutting material. Also seized from Ramsey was a notepad with Bailey's phone numbers and addresses. The next day, in executing a search warrant on Ramsey's residence, the agents recovered, *inter alia*, the two pistols for whose unlawful possession Ramsey stands convicted and a cardboard sheet with Sylvia Bailey's phone numbers.

II

The critical issue in this case, in our view, is the warrantless search of the eight envelopes at the New York Post Office. Those envelopes, and a great deal of evidence deriving from their seizure, were presented before the trier, and no attempt is or could fairly be made by the Government to argue that, if the seizure was illegal under the Fourth Amendment, the error was harmless as to any of the counts. As we proceed to develop, we believe that the opening of these letters without resort to a warrant procedure was a constitutional violation, and the use at trial, over the objection of appellants, of evidence obtained thereby requires overturning the convictions.[2]

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[2] The Government remains free, of course, to retry appellants if there exists sufficient evidence, aside from the illegally seized envelopes and fruits of that seizure, to warrant such a course.

Inspector Kallnischkies was a supervisor of Customs Service Inspectors dealing with international letter class mail (the category closest to domestic first class mail). He testified that foreign airmail mail coming to the New York General Post Office is placed on a conveyor belt for sorting, and during that process he would remove any items that looked "suspicious." Tr. of October 25, 1974 Hearing, at 6. In this instance, he removed eight envelopes from the belt because they were from Thailand—a known source of heroin—and were bulky.[3] *Id.* at 7. He weighed one of the envelopes and found it to weigh 42 grams, roughly three times the weight of a normal letter. *Id.* at 8-9. The envelope also "felt like there was something in there. . . ." *Id.* at 9. He then opened one envelope and found a plastic bag containing white powder between some pieces of cardboard. Upon testing, the powder was found to be heroin. The other envelopes also were found to contain heroin.

The Government would place this search within the border search exception to the warrant requirement. The view that *packages* moving through international mail fall within the border search exception has been

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[3] Kallnischkies testified that often he could feel cardboard inside an envelope, and that if there is a bag of heroin concealed inside, shaking the envelope will cause the bag to fall into one particular spot. Tr. at 33. He could not specifically say in the case in question that he felt anything other than the bulkiness of the envelope. *Id.* at 34.

uniformly adopted by courts confronting that question. *E.g.*, *United States* v. *Doe*, 472 F.2d 982, 984 (2d Cir.), *cert. denied*, 411 U.S. 969 (1973); *United States* v. *Galvez*, 465 F.2d 681, 687 (10th Cir. 1972); *United States* v. *Beckley*, 335 F.2d 86, 88-89 (6th Cir. 1964), *cert. denied*, 380 U.S. 922 (1965); *United States* v. *Swede*, 326 F. Supp. 533, 535-36 (S.D.N.Y. 1971); *United States* v. *Sohnen*, 298 F. Supp. 51, 54-55 (E.D.N.Y. 1969). The last-mentioned court, (Weinstein, D.J.), indicated that it might reach a different result where letters, rather than packages, were involved. *United States* v. *Sohnen*, *supra*, at 55.

However, two circuits have squarely ruled that international letter mail, like international package mail, does fall within the border search exception. *United States* v. *Bolin*, 514 F.2d 554, 557 (7th Cir. 1975), *citing United States* v. *Odland*, 502 F.2d 148, 151 (7th Cir.), *cert. denied*, 419 U.S. 1088 (1974); *United States* v. *Barclift*, 514 F.2d 1073, 1074-75 (9th Cir.) (per curiam), *cert. denied*, 423 U.S. 842 (1975). *See also United States* v. *Francis*, 487 F.2d 968 (5th Cir. 1973), *cert. denied*, 416 U.S. 908 (1974).[4] Both of these circuits rested their analysis

[4] At page 9 of its brief, the Government notes that the Supreme Court has refused to limit the power to search international mail upheld in *Odland*, *Francis*, and *Doe*. The inference that we are unmistakably invited to draw is that the Supreme Court's denial of certiorari should be viewed as an endorsement of the result and perhaps the reasoning of these cases. That is an invitation which, as we ought not to have to remind the Government, conflicts with the elementary theory of certiorari review.

on nothing more than the assertion that no meaningful difference could be drawn between the entry of mail into the United States and the entry of automobiles, baggage, individuals, or packages.

In our view, that assertion is sustainable only by embracing the most sweeping concept that the "integrity of our borders" requires that all objects crossing them may be searched at the whim of the Government. If, in fact, we look to the rationale of the border search exception, we find that it is based upon (1) the impracticability of requiring a warrant given the huge volume of items moving across the border likely to contain contraband, *e.g.*, *United States* v. *Doe*, *supra*, at 982-83; *Morales* v. *United States*, 378 F.2d 187, 190 (5th Cir. 1967), and (2) the difficulty of obtaining a warrant when the subject of the search is mobile, as a car or person, *Carroll* v. *United States*, 267 U.S. 132, 153 (1925).[5]

[5] Other rationales for this longstanding exception have been suggested. One, the theory that a well-established history of warrantless searches can exempt the practice in question from the ordinary requirement of a warrant, was squarely rejected in Camara v. Municipal Court, 387 U.S. 523 (1967), in which the Court ignored the argument based on history on which it had relied eight years earlier in Frank v. Maryland, 359 U.S. 360 (1959). A second suggestion, that travelers have a less strong expectation of privacy and hence warrantless searches are acceptable, *see, e.g.*, United States v. Sohnen, *supra*, at 55; Note, *Border Searches and the Fourth Amendment*, 77 YALE L. J. 1007, 1012 (1968), is largely circular, assuming the existence of such searches as part of the justification for them; and, in any event, the rationale would not apply to searches of letter class mail, see pp. [11a-13a] *infra*.

When we compare letters to persons or automobiles it becomes apparent how little force this rationale carries when applied to letters. There are limited kinds of contraband that can be concealed within a letter-sized envelope; the decided cases appear to involve almost exclusively narcotics, although it is perhaps conceivable that small pieces of jewelry, small quantities of precious metals, or currency might also be concealed. There is, therefore, a smaller likelihood in the first instance that a letter, rather than an automobile or a suitcase, contains contraband. Moreover, as far as the central problem of narcotics is concerned, the Customs Service can effectively use trained dogs who can detect the smell of contraband drugs. *See, e.g., United States* v. *Mitchell*, 525 F.2d 1275, 1277 (5th Cir. 1976); *United States* v. *Fulero*, 498 F.2d 748 (D.C. Cir. 1974) (per curiam); *United States* v. *Feldman*, 366 F. Supp. 356, 358 (D. Hawaii 1973). Similarly, X-ray examination, or metal detectors like those currently in use at airports, could detect precious metals or jewelry. *See, e.g., United States* v. *Chiarito*, 507 F.2d 1098, 1099 (5th Cir.) (per curiam), *cert. denied*, 423 U.S. 824 (1975); *United States* v. *Sohnen, supra*, at 53. These techniques could screen out a large percentage of otherwise suspicious mail that, under current practice, is routinely opened The dimensions of the remaining problem of smuggling in letter-sized envelopes are of

a different order than those of other kinds of traffic across the border.[6]

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[6] There is, of course, no ready line available to distinguish letters from packages; the distinction is one of degree. We are satisfied that the envelopes in this case, five of which measured roughly seven by five inches and a sixth of which measured nine by four and one-half inches, Government Exhs. 35-40, were in size and appearance closer to the letter end of the spectrum and fell outside of the border search exception.

The Postal Regulations currently limit international letter class mail to pieces not in excess of four pounds (except that for Canada there is a sixty pound limit) and with a maximum length of 24 inches and a maximum length, breadth and thickness, combined, of 36 inches. 39 C.F.R. §§ 22.1(b), (c)(1) (1975). In our view, the Government could be sure of complying with the Fourth Amendment by treating all international letter class mail as outside the border search exception. It might be objected that many pieces within that class are much more like "packages" than "letters," and that therefore a narrower class of items outside the exception must be defined. That point surely carries force, but the difficulty is most easily solved in the first instance by governmental attempts to formulate a dividing line that more appropriately separates "packages" and "letters." To be sure, even the most acceptable definition will be arbitrary at the margin, as is true of most difficult line-drawing problems. But that presents no reason for drawing no line at all and thereby giving no weight whatsover to the important privacy and expressive interests. *See* Haddock v. Haddock, 201 U.S. 562, 631-32 (1906) (Holmes, J., dissenting) ("I have heard it suggested that the difference is one of degree. I am the last man in the world to quarrel with a distinction simply because it is one of degree. Most distinctions, in my opinion, are of that sort, and are none the worst for it. But the line which is drawn must be justified by the fact that it is a little nearer than the nearest opposing case to one pole of an admitted antithesis.") And in most cases, a piece of mail will clearly fall on one side of a common sense dividing line between "letters" and "packages." *See, e.g.*, Tr. of Oct. 25, 1974 Hearing, at 23.

[Footnote continued on page 10a]

Furthermore, suspicious-looking letters (and, to be sure, packages as well), unlike more mobile automobiles or travellers, can easily be detained to permit further examination (as with dogs, magnetometers, or X-rays) or to obtain a warrant. In *United States* v. *Van Leeuwen*, 397 U.S. 249 (1970), the Supreme Court unanimously upheld the authority of officials to detain first class mail for a period of 29 hours while they investigated suspicious circumstances and obtained a search warrant. Given this holding, it would appear to be an *a fortiori* case for Customs Inspectors to detain *international* letter mail for a reasonable period in which to investigate and, if appropriate, to obtain a warrant.

It thus seems that searches of international letter mail at best strain the rationale of the border search exception. Like all exceptions to the warrant requirement, *see generally, e.g., United States* v. *United States District Court*, 407 U.S. 297, 318 (1972); *Coolidge* v. *New Hampshire*, 403 U.S. 443, 454-55 (1971); *Jones* v. *United States*, 357 U.S. 493, 499 (1958), the border search exception must be carefully and narrowly drawn. The Supreme Court has in recent years twice declined to take an expansive view of the border search exception or the authority

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[6] [Continued]

We believe that a careful attempt to define subclasses of international mail by the Government, so as to clearly separate "packages" from "letters," can provide sufficient certainty; and in cases where uncertainty persists, the Government can deal with it by avoiding brinksmanship and instead taking the preferred course of seeking a warrant.

of the Border Patrol. *See United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975); *Almeida-Sanchez* v. *United States*, 413 U.S. 266 (1973). And as in the Court's most recent decision, in the instant case we are "not convinced that the legitimate needs of law enforcement require this degree of interference with lawful traffic." *United States* v. *Brignoni-Ponce*, *supra*, at 883.

Finally, and probably most important, letter mail is a vital means of communication in our society. Letters express the most important and sensitive of our personal, familial, political, professional, and financial affairs. They implicate both our deepest privacy and our interest in free expression, far more than packages or suitcases or automobiles. In the words of Justice Holmes, "the use of the mails is almost as much a part of free speech as the right to use our tongues." *United States ex rel. Milwaukee Social Democratic Pub. Co.* v. *Burleson*, 255 U.S. 407, 437 (1921) (Holmes, J., dissenting), *quoted with approval in Blount* v. *Rizzi*, 400 U.S. 410, 416 (1971), *and United States* v. *Van Leeuwen*, *supra*, at 251.

Even if the ordinary practice of the Customs Service is not to read the mail that is opened, *see* note 9 *infra*, mere knowledge on the part of individuals of the practice of routinely opening mail inhibits the exercise of free speech. *See Procunier* v. *Martinez*, 416 U.S. 396, 423 (1972) (Marshall, J., concurring); *cf. Talley* v. *California*, 362 U.S. 60, 65 (1960); *NAACP* v. *Alabama*, 357 U.S. 449, 462 (1958). And the Supreme Court has indicated that limits on search

and seizure must be especially strong where First and Fourth Amendment values converge. *See, e.g.*, *United States* v. *United States District Court, supra,* at 313-14; *Stanford* v. *Texas,* 379 U.S. 476, 485 (1965).

The Court has also noted, with reference to the need to enforce Fourth Amendment protections, that "[h]istory abundantly documents the tendency of Government—however benevolent and benign its motives—to view with suspicion those who most fervently dispute its policies." 407 U.S. at 314. The recent disclosures about the widespread illegal searches of mail by United States intelligence agencies, *see, e.g.*, REPORT TO THE PRESIDENT BY THE COMMISSION ON CIA ACTIVITIES WITHIN THE UNITED STATES [THE ROCKEFELLER COMMISSION], June 1975, at 101-15, 168; S. REP. No. 755, 94th Cong., 2d Sess., Book II, at 12, 17, 38, 62, 107-08 (1976); *id.*, Book 3, at 559-677; *Hearings before the Senate Select Comm. to Study Governmental Operations with Respect to Intelligence Activities,* 94th Cong., 1st Sess., Vol. 2, at 1-2, 15-16, 51-63, 66, 76 (1975); *id.*, Vol. 4, at 2, 4, 6-7, 10-11, 21-22, 31-35, 38, 43, 148, 150, 163; *id.*, Vol. 6, at 202-06, 367, highlight the importance of the Supreme Court's observation. The Supreme Court has also stated, as one reason supporting its requirement that warrants be obtained for electronic surveillance related to the domestic aspects of national security, that "[b]y no means of least importance will be the reassurance of the public generally that indiscriminate wiretapping and bugging of law-abiding citizens

cannot occur." *United States* v. *United States District Court, supra,* at 321. Routine opening of international mail presents the same threat to First Amendment interests, and enforcing the protections of the Fourth Amendment can provide law-abiding citizens with the same important assurance.

It thus appears that there is not a sufficient need, and there is too great a risk to personal privacy, to extend the border search exception to permit unrestrained opening of international mail.[7] We believe that the values protected by the First and Fourth Amendments demand that, before international letter mail is opened, a showing of probable cause[8] be made

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[7] The fact that the search in this case might be authorized by 19 U.S.C. § 482 (1970) is of no consequence, for it is well established that "'no Act of Congress can authorize a violation of the Constitution.'" United States v. Brignoni-Ponce, *supra,* at 877, *quoting* Almeida-Sanchez v. United States, *supra,* at 272.

[8] Adherence to a probable cause standard should not hamstring the Government; indeed, we believe that the facts in this case are such that, had they been presented to a magistrate, issuance of a search warrant permitting opening of the envelopes would have been appropriate. Here, as elsewhere, "[i]n dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." Brinegar v. United States, 338 U.S. 160, 175 (1949); *accord, e.g.*, Spinelli v. United States, 393 U.S. 410, 419 (1969):

> . . . we do not retreat from the established propositions that only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause, *Beck* v. *Ohio,* 379 U.S. 89, 96 (1964); . . . that in judging probable cause issuing magistrates are not to be con-

to and a warrant [9] secured from a neutral magistrate.

Any suggestion that adherence to the warrant requirement would serve no purpose in a case like the one at bar cannot be sustained. If the suggestion is directed merely against the clear recognition of the independent force of the Fourth Amendment's warrant clause, it cannot be persuasive. And there are at least three distinct functions that a warrant procedure would serve. First, by requiring that the inferences to which law enforcement officials are entitled be drawn by neutral magistrates rather than by officers in the heat of duty, *see Johnson* v. *United States*, *supra*, at 13-14, it helps to limit unjustified intrusions upon the private and communicative material con-

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fined by niggardly limitations or by restrictions on the use of their common sense, *United States* v. *Ventresca*, 380 U.S. 102, 108 (1965) . . . .

A by no means exclusive list of facts that tend to establish probable cause would be: the size of the letter; whether inspection by X-ray or sniffing by a trained dog corroborates any suspicion; whether feeling the package from the outside gives reason to suspect contraband; the country of origin; an unusual and suspicious address or return address; an unusual number of letters sent from and/or to the same address within a short period of time; a reasonable basis to believe that the sender or recipient is engaged in smuggling; and so forth.

[9] Such warrants would, of course, almost always be limited to inspecting the mail for contraband and would not authorize the reading of any communication contained inside. 19 C.F.R. § 145.3 (1975) currently prohibits the reading of correspondence in sealed letter mail absent a warrant specifically authorizing that action, although it appears that there is no sanction accompanying that prohibition.

tained in letter mail. Second, it creates a record of the circumstances justifying an opening before the search occurs; this record minimizes the burden of *post facto* judicial review, *United States* v. *United States District Court*, *supra*, at 321, and sharply limits the possibility that officials will attempt to justify a search by what it turns up rather than what was known beforehand, *see*, *e.g.*, *United States* v. *Di Re*, 332 U.S. 581, 595 (1948). Inspector Kallnischkie's inability to remember precisely the basis upon which he determined to open the letters in question, *see* note 3 *supra*, illustrates the importance of this purpose.

Finally, establishment of a warrant machinery is a bulwark against the enlistment of mail openings not on behalf of responsible law enforcement, but rather to serve other, less commendable purposes. In *Almeida-Sanchez*, the Supreme Court reminded us of Justice Jackson's words shortly after returning from the Nuremberg trials:

> These [Fourth Amendment rights], I protest, are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government.

413 U.S. at 274, *quoting Brinegar* v. *United States*, 338 U.S. 180 (1949) (Jackson, J., dissenting). To advert again to the documented abuses by American

intelligence agencies in conducting mail searches does not reflect an obsession with current headlines, but rather highlights the importance of our duty to enforce the Fourth Amendment's protection of individual privacy and security.[10]

The Government has suggested that a warrant requirement would be impracticable, but there is absolutely nothing in the record to support this assertion. No proof has been adduced to show, and we have no reason to believe, that using X-ray inspection, metal detectors, specially trained dogs, and the like to dispel suspicion, raised by external appearance, that a letter contains narcotics, the remaining number of pieces of suspicious-looking letter mail is overwhelming. Moreover, a warrant procedure need not be unduly burdensome. A Customs Inspector could each morning display to a magistrate letters from the previous day's mail that he wished to open and indicate his reasons for so wishing; conceivably, the warrant procedure could be conducted entirely orally so long as a complete record was maintained; the Government could station a magistrate on a regular full or part-time basis at such centers as the New York Post

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[10] As Judge Prettyman noted many years ago,

> "We are dealing with doctrines and not with the presumable taste and sense of individual officials. Maybe none of these examples would ever occur. But the question before us is not whether they would happen but whether they legally could."

District of Columbia v. Little, 178 F.2d 13, 18-19 (D.C. Cir. 1949), *aff'd on other grounds*, 339 U.S. 1 (1950).

Office, where the volume of mail is heaviest. Other techniques both to facilitate examination of letters short of opening them and to streamline the warrant process might be devised.

In light of all of these seemingly feasible alternatives, we are unpersuaded by the Government's argument. Indeed, that argument is seriously compromised by the fact that, after the seizure in New York of the eight envelopes, officials at the Washington, D.C. Post Office were alerted; and when they intercepted three similar envelopes, *they sought and obtained a search warrant*. The course they chose to take strikes us as responsive to the Supreme Court's repeated admonitions that the warrant requirement "is not an inconvenience to be somehow 'weighed' against the claims of police efficiency," *Coolidge* v. *New Hampshire*, *supra*, at 481; that the inconvenience and delay involved in obtaining a warrant are "never very convincing reasons" for failing to obtain one, *Johnson* v. *United States*, *supra*, at 15; that "the Constitution recognizes higher values than speed and efficiency," *Stanley* v. *Illinois*, 405 U.S. 645, 656 (1972); and that

> The needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards.

Almeida-Sanchez v. *United States*, *supra*, at 273.

The fact that the authorities locally in this jurisdiction observed, apparently without difficulty, the warrant requirement in like circumstances underscores the lack of cogency in apellees' suggestion that we are faced with one of those relatively few instances in which adherence to the warrant requirement is genuinely impracticable. There is no question that international letter mail presents a serious threat to effective drug law enforcement. But successful containment of that threat does not require abandonment of the Fourth Amendment.

The judgments of conviction are reversed and the cases remanded to the District Court for further proceedings consistent herewith.

It is so ordered.

ROBB, *Circuit Judge, dissenting*: I regret that I am unable to join in the thoughtful and scholarly majority opinion. A few words will indicate the reasons for my dissent.

Searches classified as border searches have always been free of both the warrant and the probable cause requirements of the Fourth Amendment. *Boyd* v. *United States*, 116 U.S. 616, 623 (1886); *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 272 (Majority Op.), 287-88 (Dissenting Op.) (1973); *United States* v. *Beckley*, 335 F.2d 86 (6th Cir. 1964), *cert. denied, sub nom., Stone* v. *United States*, 380 U.S. 922 (1965); *See Zweibon* v. *Mitchell*, 170 U.S. App. D.C. 1, 38-39, n.93, 516 F.2d 594, 631-32, n.93 (1975).[1] This means that a traveller and his luggage and effects may be subjected to a reasonable search, without a warrant, when he crosses the border. The search may of course extend to packages he is carrying, and I think he may reasonably be required to open a sealed envelope carried in his pocket or handbag; that the contents to be inspected are enclosed in an envelope, rather than by wrapping paper and twine, cannot be of critical significance. If I am right

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[1] Citing Camara v. Municipal Court, 387 U.S. 523 (1967) the majority suggests that the Supreme Court has abandoned "the argument based on history". The Camara case however involved a warrantless entry by a housing inspector in San Francisco; it did not involve a border search. The opinion for the Court was written by Mr. Justice White. In Almeida-Sanchez v. United States, 413 U.S. 266, 287-88 (1973) Mr. Justice White, dissenting, forcefully stated and approved the historical underpinnings of border searches.

about this then I think a sealed envelope acquires no additional protection or immunity from search because it moves through international mail, rather than in a traveller's luggage or on his person. There is no more reason to require a warrant in one case than in the other.

The majority argues that warrants authorizing the opening of letter mail may be obtained with ease. Yet this argument applies equally to packages and envelopes, and the majority does not deny that packages crossing the border in the mail may be opened without a warrant. Furthermore, the First Amendment considerations emphasized by the majority apply also to packages, for writings of a sensitive and personal nature, such as diaries, political tracts, and the like may be transmitted in wrappings rather than envelopes.

From what has been said it follows that I agree with the decisions of the circuit courts of appeals for the seventh and ninth circuits in *United States* v. *Bolin*, 514 F.2d 554, 557 (7th Cir. 1975); *United States* v. *Odland*, 502 F.2d 148, 151 (7th Cir.), *cert. denied*, 419 U.S. 1088 (1974); and *United States* v. *Barclift*, 514 F.2d 1073, 1074-75 (9th Cir.) (per curiam), *cert. denied*, 423 U.S. 842 (1975). Unless and until the Supreme Court repudiates those decisions I would not do so.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1975
Criminal 74-623

No. 75-1275 and 75-1276
UNITED STATES OF AMERICA
v.
CHARLES W. RAMSEY, APPELLANT

No. 75-1691
UNITED STATES OF AMERICA
v.
JAMES W. KELLY, APPELLANT

Appeals from the United States District Court for the District of Columbia

Before: MCGOWAN, TAMM and ROBB, Circuit Judges

JUDGMENT

These causes came on to be heard on the record on appeal from the United States District Court for the District of Columbia and were argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that the convictions appealed from in these causes are reversed and these cases are hereby remanded to the District Court for further proceedings, in accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court
/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: June 10, 1976

Opinion for the Court filed by Circuit Judge McGowan.

Dissenting opinion filed by Circuit Judge Robb.

[Filed Jun. 10, 1976, United States Court of Appeals for the District of Columbia Circuit
George A. Fisher, Clerk]

APPENDIX C

1. Section 3 of the Act of July 18, 1866, 14 Stat. 178, 19 U.S.C. 482, provides in relevant part:

> Any of the officers or persons authorized to board or search vessels may stop, search, and examine * * * any vehicle, beast, or person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law, whether by the person in possession or charge, or by, in, or upon such vehicle or beast, or otherwise, and to search any trunk or envelope, wherever found, in which he may have a reasonable cause to suspect there is merchandise which was imported contrary to law; * * *.

2. Section 582 of the Act of June 17, 1930, 46 Stat. 784, 19 U.S.C. 1582, provides in relevant part:

> The Secretary of the Treasury may prescribe regulations for the search of persons and baggage * * *; and all persons coming into the United States from foreign countries shall be liable to detention and search by authorized officers or agents of the Government under such regulations.

3. 19 C.F.R. Part 145 provides in relevant part:

* * * * *

§ 145.1 Definitions.

The following are general definitions for the purposes of part 145:

(a) *Mail.* "Mail" or "international mail" means both Postal Union mail and parcel post, as those terms are construed in 39 CFR Part 12.

(b) *Letter mail.* "Letter mail" means letters and letter packages in Postal Union mail.

(c) *Package.* "Package" means any parcel, packet, envelope, or other similar container, whether sealed or unsealed, arriving in the international mail.

§ 145.2 Mail subject to Customs examination.

All mail originating outside the Customs territory of the United States, whether sealed or unsealed, is subject to Customs examination, except:

(a) Mail known or believed to contain only official documents addressed to officials of the U.S. Government;

(b) Mail addressed to Ambassadors and Ministers (Chiefs of Diplomatic Missions) of foreign countries; and

(c) Letter mail known or believed to contain only correspondence or documents addressed to diplomatic missions or the officers thereof, or to international organizations designated by the President as public international organizations pursuant to the International Organizations Act (see § 148.87(b) of this chapter). Mail, other than letter mail, addressed to such designated international organizations is subject to Customs examination except where the organization certifies under its official seal that such mail contains no dutiable or prohibited articles. Any Customs examination made shall, upon request of the addressee international organization, take place in

the presence of an appropriate representative of that organization.

§ 145.3 Reading of correspondence prohibited.

No Customs officer or employee shall read or authorize or allow any other person to read any correspondence contained in sealed letter mail of foreign origin unless a search warrant has been obtained in advance from an appropriate judge or U.S. magistrate which authorizes such action.

§ 145.4 Dutiable merchandise without declaration or invoice, prohibited merchandise, and merchandise imported contrary to law.

(a) *Subject to seizure and forfeiture.* When, upon Customs examination, a package from abroad is found to contain merchandise subject to duty or tax, and the package is not accompanied by an appropriate Customs declaration and invoice or statement of value required by § 145.11, or is found to contain material prohibited importation or imported contrary to law, the merchandise is subject to seizure and forfeiture.

* * * * *

4. 39 C.F.R. Part 61 provides in relevant part:

§ 61.1 What is subject to examination.

All mail originating outside the customs territory of the United States is subject to customs examination, except (a) mail addressed to Ambassadors and Ministers (Chiefs of Diplomatic Missions) of foreign countries, (b) letter mail known or believed to contain only correspondence

or documents addressed to diplomatic missions or the officers thereof, or international organizations designated by the President as public international organizations pursuant to the International Organizations Immunities Act, and other mail addressed to such international organizations pursuant to instructions issued by the Department of the Treasury, and (c) mail known or believed to contain only official documents addressed to officials of the U.S. Government.

§ 61.2 Separation points.

(a) *Exchange offices.* Mail believed to contain matter liable to customs duty or believed to contain prohibited matter is submitted immediately to local customs officers, except when exchange offices are authorized to redispatch such mail to designated distribution offices for customs treatment thereat. Exchange offices which redispatch matter to be submitted to customs officers will attach Tag 10 (previously Label 81), a reusable pink slotted tag, bearing the words, "This sack contains mail Supposed Liable to Customs Duty," to the label holders or hasps of sacks or pouches.

(b) *Distribution offices.* Distribution offices will submit such mail to customs officers as soon as possible after receipt. The reusable tags, Tag 10, removed from sacks containing this mail will be returned periodically to the postmasters at New York, New Orleans, San Francisco, Seattle, or Miami, as may be appropriate from a geographical standpoint.

(c) *Priority treatment of airmail.* Airmail articles receive preferential customs treatment and are submitted to customs separately from sur-

face mail. Upon return from customs, dispatch will be by air if it will expedite delivery.

§ 61.3 Examination.

(a) *Registered mail.* The postmaster or other designated postal employee must be present when registered articles and registered parcels are opened by customs officers for examination. After customs treatment, the customs officer will repack and reseal the articles and parcels.

* * * * *

(c) *Failure to receive customs treatment.* Should an article known or supposed to be dutiable be observed at or en route to the office of address without having received customs treatment, forward it, labeled "For Customs Inspection," under cover to U.S. Customs Office at the nearest office listed in § 61.3(d), except that if registered matter is involved send to the Postmaster of the city where the customs office is located so the mail may be handled in accordance with § 61.3(a). Packages that have received customs treatment will bear an endorsement such as "Passed Free U.S. Customs" or the red adhesive U.S. Customs Service envelope that contains Customs Mail Entry, Form 3419. The U.S. Customs Service does not endorse "Passed Free of Duty" on printed matter (magazines, newspapers, circulars, and books). If printed matter is dutiable it will bear the red adhesive envelope that contains Customs Mail Entry, Form 3419.

* * * * *

§ 61.4 Repacking.

(a) *Responsibility of customs and postal employees.* Customs employees have responsibility for resealing or repacking mail of foreign origin following customs examinations. Postal employees accepting mail which has been in customs custody for examination must determine from external inspection whether it can safely bear further handling and transportation. Customs employees are responsible for restoring mail that is not in satisfactory condition.

(b) *Customs shipments in bad order.* Shipments found to be in bad order in transit or at the delivery office must be reconditioned by postal employees. Note bad order and evidence of rifling or damage on the address side of the wrapper over the signature of the employee.

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